Supreme Court, U.S.
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No. 86-1883

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

TRIPLE "A" MACHINE SHOP, INC.,

Petitioner

vs.

SOUTHWEST MARINE, INC.

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COUNTER-STATEMENT OF QUESTION PRESENTED

Respondent had been excluded from an essential facility by a conspiracy partially manifested in a restrictive "Users' Agreement." Shortly after this lawsuit commenced in early 1978, defendants consented to "injunctive relief" by assigning rights allowing respondent access to the facility through July 2, 1981, the life of the Users' Agreement. In 1984, the court below made a "final and unconditional determination" that respondent had substantially prevailed against petitioner on its injunctive relief claim and was entitled to attorney fees (15 U.S.C. § 26) and remanded solely on damages issues. This petitioner unsuccessfully sought *certiorari* from that decision, but failed to question the determination that respondent had, in fact, substantially prevailed against it. (Petition for Writ of Certiorari, No. 84-223, August 6, 1984.) On remand in 1985, due to a change of law, petitioner was granted summary judgment on the damages claim. On re-appeal regarding attorney fees, the court below restated that respondent had long-since substantially prevailed against petitioner on the injunction claim. This second petition from that 1984 determination raises only one question:

> Whether under the unique and relatively complex facts of this case is the factual determination by the court below that respondent substantially prevailed on its claim for injunctive relief *against this petitioner* so clearly erroneous as to warrant this Court's review?

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STATEMENT OF THE CASE

The fundamental fallacy with petitioner's "Question Presented" is that it is predicated on the factual assertion that the "favorable concessions" admittedly exacted were "from another defendant who settled." The truth is, as the court below determined, the concessions were exacted from all defendants, including petitioner.

In its original decision as amended on July 11, 1984, the court below determined that "[a]s a result of the action filed by plaintiff, the *defendants* decided to permit Southwest Marine to use the dock under an assignment from National Steel and Shipbuilding Co. Thus, whether or not plaintiff ultimately prevails on

damages on remand, it has 'prevailed'. . . ." (Emphasis added.) The court then instructed the district court that if "a new trial [on the issue of damage liability] is not required, Southwest Marine is immediately entitled to a determination of damages, and an award of attorney's fees commensurate with this judgment." Appendix at A-5. (References to the "Appendix" are to the Appendix attached to the Petition.) Petitioner actually sought a writ of *certiorari* from this decision, but failed to raise the issue of Southwest Marine's entitlement to attorney fees as a "question presented." This Court denied *certiorari*. *Triple "A" Machine Shop, Inc. v. Southwest Marine, Inc.*, 469 U.S. 1072, 105 S.Ct. 564 (1984).

When the mandate returned to the district court, that court determined that the law had changed and on July 2, 1985 entered summary judgment on behalf of petitioner on the damages claims. The district court, however, failed o follow the mandate and failed to award attorney fees for the "injunctive relief" which Southwest Marine had attained. Southwest Marine appealed that refusal. In its decision of August 5, 1986, the court below stated that its 1984 decision "constituted a final and unconditional determination with respect to the attorney fee issue. We held unequivocally that Southwest Marine was entitled to recover fees against the *defendants*." Appendix C at A-15 (emphasis added). Petitioner's rehearing request was denied. *See* Appendix D. As the court below explicitly determined in its Order Amending Opinion dated December 16, 1986 (Appendix F), the issue was a factual one as to whether or not Southwest Marine prevailed against this petitioner on its claim for

injunctive relief. This well-reasoned determination is as follows:

> In the original action, Southwest Marine alleged that National Steel and Triple "A" conspired with others to deny Southwest Marine access to the dry dock and sought damages against both. Although the actual assignment of the right to use the dry dock was made by National Steel, we found that it was the defendants collectively, including Triple "A", who decided to permit Southwest Marine to use the facility. 732 F.2d at 747. In short, it was the defendants collectively, including Triple "A", who, as a result of Southwest Marine's prosecution of its action, removed the allegedly unlawful obstacle to Southwest Marine's enjoyment of its claimed rights. For that reason, we held in our earlier opinion that Southwest Marine had prevailed against Triple "A" as well as National Steel.

Appendix F at A-23. There is no error (much less "shocking" error) in this factual determination.

This lawsuit was originally commenced in February of 1978 by respondent ("Southwest Marine"), then a recent entrant into the ship repair market. Yet Southwest Marine was being foreclosed from an important segment of that market because it was being denied access to an essential facility as a result of a contract and conspiracy between and among the defendants. The essential facility, a uniquely large dry dock facility (the "Graving Dock"), was leased by the United States Navy to the San Diego Unified Port District ("the Port"). Petitioner, in concert with the

other defendants, entered into an operating agreement (the "Users' Agreement") with the Port. This Users' Agreement and defendants' underlying conspiracy restricted use of the Graving Dock to them. Certain repair contracts for the United States Navy, due to the size of the ships and the Navy's "home port" repair policy, required the utilization of the Graving Dock. Although any holder of a Navy-issued master ship repair contract could bid on said repair contracts, any low bidder would be required to demonstrate that it had access to the San Diego Graving Dock as part of the pre-award survey. The implementing device for the conspiracy to allocate this market solely among the defendants, the Users' Agreement, expired by its own terms on July 2, 1981.

In 1977 respondent attempted to procure access to the Graving Dock. Defendants and each of them continued to act in concert to prevent such access. Thus, for example, at a July 1977 hearing by the Port, petitioner objected to any amendment or interpretation which would permit respondent to have access to the Graving Dock.

Respondent sued. Shortly thereafter defendants recanted. Whatever their strategy, whether an attempt to limit the antitrust damage exposure or some other, defendants allowed respondent the necessary access. Through the remaining life of the Users' Agreement, a period of three years, Southwest Marine did in fact have access to the Graving Dock. Southwest Marine had substantially prevailed on its injunctive relief claim. It had obtained the functional equivalent of a permanent injunction regarding the Users' Agreement. In fact, in response to respondent's application for a

formal injunction, defendants argued that it was unnecessary since respondent had obtained consensual access.

In 1980 the damages claim was tried to a jury. Defendants, including petitioner, were found to have violated the antitrust laws. Only an error of law, induced by petitioner — the inappropriate application of the *in pari delicto* defense against this respondent — prevented a damages award from being entered on behalf of Southwest Marine. The court below reversed that legal error. That court then dispositively determined that Southwest Marine had substantially prevailed on its injunctive relief claim. By then, by its own terms, the de facto injunction had abated since this 1984 decision was rendered three years after the Users' Agreement had expired in 1981. The permanent injunction had dissolved by its own terms, thus the determination that Southwest Marine prevailed against petitioner was final.

Thereafter the district court concluded that there was new law and entered summary judgment against respondent's damage claim. But the "injunctive relief" had already been awarded, completed, mooted, and dissolved. The informal resolution of the injunctive relief claim had done its job. Competition had been enhanced. The Navy was given an additional competitor from whom to solicit bids. The market was less oligopolistic and more competitive. As a result when petitioner re-raised the issue on re-appeal the court below determined properly that Southwest Marine had prevailed. There is nothing in this case which warrants or counsels this Court's re-review.

REASONS FOR DENYING THE WRIT

It is really undisputed that Southwest Marine "substantially prevailed" on its claim for injunctive relief under Section 16 of the Clayton Act (15 U.S.C. § 26). As a direct result of this lawsuit, Southwest Marine gained access to the essential Graving Dock facility despite the defendants' collusion and the Users' Agreement which otherwise would have excluded it. Petitioner admits as much in its formulation of the "Question Presented" (" . . . premise that plaintiff 'substantially prevailed' by exacting favorable concessions . . . .") and its fanatical reliance below and here on *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985). This establishes that petitioner's quarrel is with the *finding* that Southwest Marine prevailed *against it* under the unique facts and conspiratorial scheme underlying this case. Such a factual determination by a lower court is not one conducive to nor appropriate for review by this Court. This is especially true where, as here, the determination is correct and petitioner has pointed to no evidence indicating a contrary finding would have been mandatory.

A second reason for denying the writ is that the court below made its "final and unconditional determination" with respect to this issue by July 11, 1984. This very petitioner sought a writ as to certain other determinations made by the court below in the 1984 opinion. It failed to raise the issue it attempts to raise now. Its failure in the preceding writ petition is binding, and petitioner should not be allowed a second bite at the lower court's 1984 determination.

Nor is there anything untoward, much less startling, about attorney fees being awarded to one who prevailed on an injunctive relief claim but, for one reason or another, failed to recover damages. Similarly the real, hidden proposition being put forth by petitioner is that the "permanent injunction" which ran from mid-1978 through mid-1981, and then lapsed because the Users' Agreement lapsed, should somehow be set aside because the district court perceived a change in the law in 1985 (seven years after the "injunction" went into effect and four years after it dissolved). That absurd proposition was never raised below. Finally, none of the cases cited by petitioner have any bearing on the issue presented here. The court below at no time acted in any other way than in complete harmony with the well-settled law of the land.

I

THERE IS NO REASON FOR THIS COURT TO REVIEW THE FACTUAL DETERMINATION MADE BELOW.

The court below expressly "found that it was the defendants collectively, including Triple 'A', who decided to permit Southwest Marine to use the [dry dock] facility." Appendix F at A-23. The court below even reiterated that "it was the defendants collectively, including Triple 'A', who, as a result of Southwest Marine's prosecution of its action, removed the allegedly unlawful obstacle to Southwest Marine's enjoyment of its claimed rights." *Id.* Petitioner's quarrel with this "finding" by the court below constitutes the lynch pin of the instant petition. Yet,

other than breast-beating, petitioner never really addresses this issue. Certainly, it does not cite any evidence, much less "overwhelming evidence" that the finding was somehow erroneous. It was not.

It is this factual determination which renders petitioner's reliance on *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985), misplaced. As petitioner itself notes, "*Kentucky* holds that an otherwise successful plaintiff cannot recover attorneys' fees from a defendant against whom it did not prevail." Petition at 11. There is absolutely nothing inconsistent between such a holding and the ruling below because of the determination that Southwest Marine prevailed against petitioner. The finding is explicit. *Kentucky* is simply not implicated. Again, petitioner is quarreling with a finding of fact, not the application of law.

It is well settled that this Court does "not grant a *certiorari* to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041, 1042 (1984) (per Justice Stevens). *See also* F. Vinson, *Work of the Federal Courts*, 69 S.Ct., at V, VI (1949). Such a rule is particularly appropriate here where the factual determination derives from a complex conspiracy. To review the lower court's factual determination would require this Court to imbue itself in an analysis of the conspiracy, the terms and conditions thereof and its purpose, history and scope. It would further require evaluation of the Users' Agreement, and the inter-relationships between and among the conspirators. Given the unique and individualized nature of this conspiracy, this Court's review would be of no precedential value.

Nor does petitioner even bother to address the issue of why the finding by the court below is of such grievous error that this Court must review it. It merely asserts, over and over, that it was a co-defendant who actually granted access rights to the essential facility to Southwest Marine. It does not attempt to establish that it did not participate in that resolution. It does not rebut the finding by the lower court that it did, in fact, participate in resolving informally the injunctive relief aspect of the case. Given this, there is no basis for further review by this Court and *certiorari* should be denied.

II

THE PETITION FOR CERTIORARI IS UNTIMELY.

The 1984 decision of the court below, published at 732 F.2d 744 (9th Cir. 1984), and the subsequent denial by this Court of a writ of *certiorari* to that decision should be dispositive. As the court below noted:

> Our decision constituted a final and unconditional determination with respect to the attorney fee issue. We held unequivocally that Southwest Marine was entitled to recover fees against the defendants.

Appendix C at A-15. It was during this original appeal in 1982-1984 that the entire factual record was before the court below and that the complex evaluation discussed above was conducted. This petitioner sought a writ of *certiorari* from that decision on August 6, 1984. It failed to timely present the question it now — some three years later — seeks to have reviewed. The

petition is untimely. If Triple "A" wished this Court to exercise its *certiorari* power and review this issue, it should have done so in its original petition for writ of *certiorari.* This petitioner should not be given a second bite of the apple. It made a strategic decision to seek review as to only one of the issues determined in 1984 and not as to the attorney fee issue, apparently believing the other issue had a greater likelihood of commanding this Court's attention. Its strategy failed, *certiorari* was denied and this petitioner should not be given a new opportunity. The petition for *certiorari* should be denied.

This Court's recent holding in *United States v. Stanley,* ___U.S.___, 55 U.S.L.W. 5101 (June 25, 1987), is dispositive. The issue of whether Southwest Marine substantially prevailed under 15 U.S.C. § 26 was decided adversely to petitioner by the Court of Appeals in 1984, "and there is no warrant for reexamining that ruling here." 55 U.S.L.W. at 5104.

III

THE DECISION BELOW IS IN KEEPING WITH THE LETTER AND SPIRIT OF THE LAW.

Section 16 of the Clayton Act (15 U.S.C. § 26) provides that in any action brought for injunctive relief for violation of the antitrust laws "in which the plaintiff substantially prevails, the Court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff." There is no requirement that plaintiff also secure an award of damages as petitioner suggests. Indeed, as petitioner concedes in its Questions

Presented, "plaintiff 'substantially prevailed' by exacting favorable concessions . . . ." The petitioner contends that these concessions were extracted from another defendant, but that contention is without merit and has been determined to the contrary. Here, plaintiff was entitled to the de facto injunctive relief amounting to a permanent injunction under the law at the time the concessions were obtained and through the time that the injunction ran. Respondent substantially prevailed.

This Court's recent discussion of when a party prevails and is entitled to attorney fees, *Hewitt v. Helms*, ___U.S.___, 55 U.S.L.W. 4907 (June 19, 1987), directly supports the decision below. *Hewitt* states that whether a plaintiff prevails depends on results — whether or not it actually obtained any court-ordered relief from the defendant:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under Section 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment, *e.g.*, a monetary settlement *or a change in conduct that redresses plaintiff's grievances.* When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

55 U.S.L.W. at 4908 (emphasis added).

The cases cited by petitioner are not to the contrary. *Hanrahan v. Hampton*, 446 U.S. 754 (1980), merely held that a court order reversing discovery orders and certain directed verdicts and remanding the case for

trial could not be the basis for prevailing-party status. That plaintiff had not yet won anything, it was merely given the opportunity to continue with its case so it might eventually prevail. However, emphatically, *Hanrahan* did not hold that a party must ultimately prevail in court with a formal judgment to be entitled to attorney fees. To the contrary, "parties may be considered to have prevailed when they vindicate rights through consent judgment or without formally obtaining relief." 446 U.S. at 756-57. The court below conformed to that decision.

Similarly, *Ruckelshaus EPA v. Sierra Club*, 463 U.S. 680 (1983), stated that fees could be awarded in all "legitimate" actions, *i.e.*, actions neither spurious nor false. The court below explicitly applied that standard:

> Southwest Marine's decision to institute litigation was neither frivolous nor unreasonable. To the contrary, its legal position at the time it filed its complaint, as well as at the time it accomplished the practical result that underlay our attorneys' fees determination, was supported by the weight of legal authority.

Appendix C at A-15. The standard in *Ruckelshaus* was recognized and applied by the court below.

It is neither unusual nor unfair that attorney fees may be awarded to one who wins injunctive relief either consensually or through court order, but does not prevail on a claim for damages. There are numerous antitrust cases in which attorney fees are awarded where one prevails on an injunctive relief claim, but does not prevail on a damages claim. Indeed, in amending the Clayton Act in 1976 to provide for

attorney fees to a substantially prevailing party on an injunctive relief claim (even without a formal order), Congress intended just that result. As Congress stated in a related context: "after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief is needed." House Jud. Com. Rep. No. 94-1558 (Sept. 15, 1976) at 7. That is this case. Whether or not damages were also awarded is irrelevant.

The Conclusion put forth by petitioner to induce this Court to act — that the instant case is the only one to construe "substantially prevails" under Section 16 of the Clayton Act "since that Act was passed almost 75 years ago," (Petition at 16) — is dead wrong. First, the attorney fee provision with its "substantially prevails" language was added by the Hart-Scott-Rodino Antitrust Improvement Act in 1976. Second, several courts have construed this language even in contexts similar to this case and the construction has been remarkably consistent. *See, e.g., Grumman Corp. v. LTV Corp.*, 533 F.Supp. 1385 (E.D.N.Y. 1982), *Harnischfeger Corp. v. Paccar Inc.*, 503 F.Supp. 102 (E.D. Wisc. 1980), *F&M Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 476 F.Supp. 203 (S.D.N.Y. 1979). In each of those cases plaintiff was awarded interim injunctive relief and thereafter *its lawsuit was dismissed.* Attorney fees were nonetheless awarded because plaintiff had substantially prevailed in achieving the injunctive relief. *See Virginia Academy of Clinical Psychologists v. Blue Shield*, 543 F.Supp. 126, 130 (E.D. Va. 1982). There is no conflict among the lower courts as to how the law should be construed. They are in agreement. There is neither conflict nor error for this Court to review.

IV

CONCLUSION

Petitioner consented to the functional equivalent of the entry of injunctive relief. Years later, after the jury found petitioner to have violated the antitrust laws, but did not enter damages because of error induced by petitioner, the law changed. Triple "A" now wishes to have its cake and eat it too. It chose to enter into the injunctive relief for strategic reasons relating to the lawsuit sufficient to itself at the time. It now makes the claim that, as to its injunctive relief claims, Southwest Marine somehow did not prevail against it. Yet Southwest Marine had access to the Graving Dock which petitioner had previously prevented. Southwest Marine was able to circumvent a conspiracy to divide the market among only a small handful of competitors. That is *prevailing* on the merits in a substantial way. Petitioner should not be permitted to come back years later and disclaim that result or the finding that it participated in consenting to the de facto injunction. Southwest Marine substantially prevailed on its claim

for injunctive relief, that makes attorney fees appropriate and the writ should be denied.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on August 12, 1987, I served the within *Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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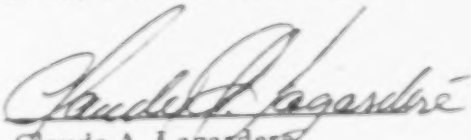
I declare under penalty of perjury that the foregoing is true and correct. Executed on August 12, 1987, at Los Angeles, California.



Claude A. Lagardere
(Original signed)